UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROY SPA, LLC,	)	
	)	
Respondent,	)	
and	)	Case No.: 19-CA-83329
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 2,	)	
	)	
Charging Party.	)	

ROY SPA LLC'S MOTION FOR RECONSIDERATION OF THE BOARD'S JULY 27, 2017 SECOND SUPPLEMENTAL DECISION AND ORDER AND MAY 10, 2016, SUPPLEMENTAL DECISION, ORDER, AND ORDER REMANDING

Pursuant to Sections 102.48(d)(1) and 102.154 of the Board's Rules and Regulations, the Applicant/Charged Party/Respondent Roy Spa LLC ("Roy Spa" or "Company") moves for reconsideration by the Board of its decision on July 27, 2017, Roy Spa, LLC, 365 N.L.R.B. No. 114 ("Roy Spa II"), which reaffirmed its May 10, 2016, 363 N.L.R.B. No. 183 (2016) ("Roy Spa I"), to deny fees and expenses under the EAJA. As further explained below, the Board's decisions fail to adhere to controlling judicial and statutory authority, depart from longstanding Board precedent without rational explanation, and is not supported by substantial evidence in the record as a whole. The Board's decisions also violate Roy Spa's statutory right to consideration of the Agency's underlying and litigation positions required by the Equal Access to Justice Act ("EAJA").

I. PROCEDURAL HISTORY

The Board's Order on August 13, 2013, adopted the Administrative Law Judge's merit's decision, JD(ATL)-18-13 (June 28, 2013) ("ALJD"), dismissing the Complaint. That ALJD sets forth the background of the case. In particular, a ULP

hearing was held in which Roy Spa submitted substantial evidence the Board had no jurisdiction over it on both the commerce and national defense standards, and other bases. Of particular significance to the present Motion, are:

1. The Regional Director's Complaint alleged jurisdiction based on commerce. Complaint ¶2(g) ("At all material times, Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.")

2, The General Counsel produced *no evidence* to establish Roy Spa met the Board's $500,000 commerce standard for the service industry.

3. The Parties stipulated at hearing during the General Counsel's case that Roy Spa had gross income less than $500,000. G.C. Ex. 2.[1]

4. The General Counsel produced *no evidence* establishing how or why it alleged national defense jurisdiction. Complaint ¶4(f) ("During the past calendar year, in conducting its operations described above, Respondent has had a substantial impact on the national defense of the United States.")

5. The General Counsel produced *no evidence* RoySpa "purchased and received" more than $5,000 from "points located outside the States of Montana and Florida, respectively." Complaint ¶2(e).

6. The General Counsel produced *no evidence* RoySpa "provided services

[1]As a result of the Stipulation, counsel for the General Counsel explained: "the issue that remains regarding jurisdiction after the stipulation is Paragraph 2(e) and the inflow and how it relates to the national defense standard." Tr. 11:18-20.

valued in excess of $5,000 to points located outside the State of Virginia," to support his amendment of the Complaint at hearing. See G.C. Ex. 19.[2]

In the underlying merits case, the GC failed to 1) to produce any evidence to show cutting hair had "a substantial impact on national defense," or 2) to show how a union representing exclusively "barbers" lays claim to work performed in a unit consisting of licensed cosmetologists.

In its EAJA review in Roy Spa I, the Board majority found the General Counsel's assertion of "jurisdiction over Roy Spa pursuant to the Board's national defense standard was substantially justified," but not why. Roy Spa I at 4. ALJ Marchionese's adopted recommendation reiterated he found Roy Spa "did not meet either the Board's discretionary jurisdictional standards or the national defense standard for asserting jurisdiction. Id. at 8. He found the Board had "historically applied" the national defense standard "to assert jurisdiction over barber shops on military bases" similar to Roy Spa when "those cases showed that the employers also satisfied the Board's discretionary standards...as a basis for jurisdiction," such as Spruce Up Corp., 181 N.L.R.B. 721 (1970). Id. at 9.

Judge Marchionese's adopted recommendation also clarified the Board's "more recent cases" showed the "Board had declined jurisdiction over hair care facilities under the national defense standard," required a nexus to national defense, citing

[2]Counsel for the General Counsel explained "they provided services in excess of $5,000 at points outside the State of Virginia." Tr. 187 ll.19-22; 188 ll.1-2. Roy Spa objected to this late oral motion to amend the complaint, tr. 191 ll.7-25 to 192 l.2. Tr. 326. Still, no evidence proving the claim was introduced.

Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248, 1248 (1981) (to establish what the "link between the Employer's operations and the national defense effort is.") and Fort Houston Beauty Shop, 270 N.L.R.B. 1006 (1981). Because the recent cases "did not overrule the older cases," or "had never addressed the exact factual situation here," Judge Marchionese reasoned "reasonable minds could differ as to where the case should fall." Id.

The ALJ's key EAJA finding at page 9 of Roy Spa I was:

> Here the question of jurisdiction was close and could have gone either way. Under these circumstances, the General Counsel was substantially justified in *issuing the complaint and litigating the issue of jurisdiction* rather than dismissing the unfair labor practice charge and leaving the Charging Party and the employees it represented with no remedy for a potential violation of the act. [Emphasis added].

Roy Spa's Appeal from this ALJD challenged the implicit finding that there was any litigation of the issue of jurisdiction. The ALJ's point was the General Counsel had a theory for issuing complaint and could do so. But, the General Counsel pointed to no evidentiary evidence to support the Complaint.

Roy Spa's objection was the record shows no such evidence was introduced and therefore no substantial justification could be established. The EAJA questions clearly posed now are 1) whether the General Counsel was substantially justified in bringing a case with no evidence to support his threshold allegations of jurisdiction and therefore, 2) whether the intent for bringing the case was to bully Roy Spa, LLC into settlement or a legitimate reason.

The remand of Roy Spa I resulting in Roy Spa II, adopts Chief Judge Giannasi's finding that while Roy Spa was arguably a successor despite not holding

a contract to perform "barber shop" services, the obligation to bargain arose and remained, despite Roy Spa, LLC's repudiation of all contract relations outside the Section 10(b) period. Roy Spa II, 365 N.L.R.B. No. 114 at 6.

Roy Spa had repudiated all contacts with the Union and its contract and openly changed terms and conditions of employment outside the 10(b) period. While Judge Giannasi calls Local Lodge 1424, Machinists v. NLRB, 362 U.S. 411 (1960), an evidentiary bar, id. at 6, the entire relationship had been repudiated outside the 10(b) period under A & L Underground, 302 N.L.R.B. 467 (1981). Moreover, under Garner/Morrison, LLC, 353 N.L.R.B. No. 78 (2009), the Board requires that a Section 9(a) contract obligation cannot arise where the employer had not hired a representative complement of employees.

Judge Giannasi's unfamiliarity with the record led him to assume incorrect facts that at the time of transition, up to 7 original barbershop employees remained. Id. at 5. This is expressly contrary to Judge Marchionese's findings of the change in complement and the record showing supervisors Dustin and Shiloh lost employment as they were barbers. Tr. 305:3-6.[3]

Judge Marchionese correctly found in his adopted Decision, ALJD 6:25-29:

> The employee complement also changed between September and July 2012. By the time of the conversion, only three unit employees remained. The other two, who did not have cosmetology licenses, left their employment. The Respondent increased its complement to nine

[3]Roy Spa hired six new employees since it became a concessionaire. Nine cosmetologists were on staff in July 2012, which is more than were ever employed performing barber services. In February 2013, Roy Spa employed ten persons. Tr. 273 ll.17-19. All were cosmetologists as required by AAFES.

employees, all with cosmetology licenses.

In both Roy Spa I and Roy Spa II, Chairman Miscimarra dissented. In Roy Spa I he challenged granting the General Counsel an untimely motion for extension of time to respond to Roy Spa's Application for Fees because the General Counsel showed no valid reason or excusable neglect why he failed to file a response on time. In Roy Spa II, Chairman Miscimarra further dissented and explained that Roy Spa's "concrete plans to make substantial changes in it operations," Roy Spa II at 7, was required by its AAFES contract.

That requirement to transform showed the temporary continuation of barber operations was simply expedient and therefore "among the matters to be considered are whether the situation at the moment of transfer is intended to be permanent or temporary, and if temporary how different the permanent situation will be. Also relevant is whether a change, if one is contemplated, is imminent and certain or merely speculative," as required in cases such as Galis Equip. Co., Inc., 194 N.L.R.B. 799, 799 (1972) (successor temporarily continued old work and then changed composition of workforce)[4], had not been taken into account by the Board majority in

[4]In Galis, the Board's holding is clear:
"[I]n determining whether a purchaser is a successor for the purposes of Section 8(a)(5), the crucial inquiry is the continuity of the employing industry....On the basis of the facts as set forth above, we are satisfied that Respondent's continuation in the same employing industry as Metal Systems was merely a temporary expedient, and that a change in the nature of the operation to be performed was not only imminent and certain at the time of the transfer from Metal Systems to Respondent, but was in fact effectuated soon thereafter. We are further satisfied that this change is sufficiently substantial to warrant the conclusion that Respondent's operations are not in the same employing industry as Metal Systems' operations. In these circumstances we find
(continued...)

Roy Spa II. The failure to do and now not to do so is unreasonable in the circumstances.[5]

While agreeing with the majority the current record might make the General Counsel's position as a whole look substantially justified, Chairman Miscimarra found the Board majority "cannot fairly conclude, without reaching and deciding the merits, that "the violations would probably have been established." Id. Because Chairman Miscimarra believes the Board's majority's excusal of the General Counsel's "flagrant disregard of applicable deadlines" led the ALJ to consider the General Counsel's motion to dismiss and other arguments related to the untimely filing, "the Board cannot disentangle its disposition of Roy Spa's EAJA application," and therefore the Application should be considered on the record "minus those untimely filings." Id. (Roy Spa, LLC agrees).

The EAJA review by the Board to date in Roy Spa I and Roy Spa II, considered the case as "an inclusive whole" wherein the Board majorities found the GC only needed to assert the possibility of jurisdiction and set forth conclusory facts in a complaint without producing any evidence in hand to prove either one. Judge Marchionese's belief this is enough evidence, and the Board's silent adoption thereof, is not the EAJA standard dictated by statute.

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[4](...continued)
that Respondent is not a successor to Metal Systems for purposes of applying the obligations of Section 8(a)(5) of the Act, and we shall therefore dismiss the complaint in its entirety."

[5]Judge Marchionese found when "Respondent moved" it "changed the type of services performed from a barber shop to a full service salon, and changed the customer base to increase the number of women for whom it provided hairstyling services," ALJD 6:23-25

II. ARGUMENT

1. The EAJA Requires the Agency to Support Both its Underlying and Litigation Positions with Substantial Evidence Which the Board's Decisions Fail to Do.

Roy Spa, LLC is the prevailing party in this litigation and this fact "is not open to question." Roy Spa I, 363 N.L.R.B. at 5 n.16.

5 U.S.C. §504, directs payment of fees and expenses to the prevailing party in Agency litigation with two statutory directives.

First, subsection (a)(1), states:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. *Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole*, which is made in the adversary adjudication for which fees and other expenses are sought. [Emphasis added].

Second, 5 U.S.C. §504(b)(E) provides:

> (E) "*position of the agency*" means, *in addition to the position taken by the agency in the adversary adjudication*, *the action* or failure to act *by the agency upon which the adversary adjudication is based*; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings. [Emphasis added].

No special circumstances have been identified to make the award of EAJA fees unjust. Rather, the Board has, as Chairman Miscimarra points out, "overstated the strength of the General Counsel's case on the merits as to Roy Spa's alleged

successor status." Roy Spa II at 2.

While the Board majority's discussions in the two Decisions over the questions of jurisdiction and successorship are abbreviated, they overstate the evidence submitted by the General Counsel and fall far short of establishing each and every one of his allegations were substantially justified during the hearing and in brief. Providing the "benefit of the doubt" is inconsistent with the Agency finding its underlying position and its position in the litigation can be substantially justified within the meaning of the EAJA.

The General Counsel's burden, of course, is not to make just any showing of justification or intend a moot court presentation, but rather to present a "strong showing to demonstrate that its action was reasonable." H.Rep. No. 1418, 96th Cong., 1st Sess. 16, 22, reprinted in 18 U.S. Code Cong. & Ad. News 4984, 4997 (1980). This is a mandatory review in both the underlying reason for filing the complaint as well as in its litigation presentation.

In the 1985 revision of the EAJA, the Congress explicitly repudiated the holding in Spencer v. NLRB., 712 F.2d 539 (D. C. Cir.1983), where the circuit court ruled only the Board's attorneys' arguments in the litigation were to be scrutinized and not the underlying agency basis for litigating. H.R.Rep. No. 99–120, at 11–12, reprinted in 1985 U.S.C.C.A.N. 132, 139–40. Handron v. Secretary Department of Health and Human Services, 677 F.3d 144, 155 (3d Cir. 2012).

The purpose of the EAJA is "to eliminate for the average person the financial disincentive to challenge unreasonable government actions." Richard v. Hinson, 70 F.3d 415, 417 (5th Cir.1995) (citing INS v. Jean, 496 U.S. 154, 163 (1990)). Here,

Roy Spa, LLC was at a huge disadvantage. The Board's ULP hearing was held in Great Falls, Montana, when Roy Spa, LLC, a husband-wife business was located in Centreville, Virginia. Great Falls is a place where only one employment lawyer was listed. See Application, Declaration of Joyce Cayli ¶6.

The Board's present assertion, without citing evidence or otherwise explaining that national defense jurisdiction will always be substantially justified by the General Counsel, is subject to vast abuse. If in fact, the Board's position is the "old" cases dealing with coverage of barber shops on military bases are resolved simply by their presence on base, then there is no purpose for the $500,000 threshold having been discussed in each of those cases. The retail standard for commerce jurisdiction is set forth in O K Barber Shop, 187 N.L.R.B. 823 (1971).

The EAJA abuse Roy Spa seeks to rectify is the concept an allegation alone of national defense jurisdiction is sufficient to establish substantial justification.

While Roy Spa, LLC is a hair salon business, from the ALJ's EAJA perspective, it business purpose was irrelevant to national defense jurisdiction because it was a concessionaire on a military base. With no intent to be facetious, the assertion of national defense jurisdiction over concession providers of coffee and burgers (e.g., local versions of Starbucks Coffee or Burger King Whoppers), food trucks, and fashion jewelry on a military base, as these Decisions reveal, will always be substantially justified. If the consumption and purchase of such products by military personnel, by the fact one service person paid for a haircut, is enough nexus to be considered vital for national defense, Board case law will never require further proof to establish national defense jurisdiction.

Here, Judge Marchionese explicitly found the General Counsel produced *no evidence* of any kind to establish jurisdiction on any basis, to wit:

1. "No evidence was offered regarding the Respondent's gross revenue or income for calendar year 2012, or for the 12-month period after it commenced operations at Malmstrom." ALJD 2:25-27.
2. "Counsel for the General Counsel offered no evidence regarding the Respondent's revenue from its operations at the other four facilities in 2012." ALJD 3:12-13.
3. "The record contains no evidence that would show what, if any impact, a labor dispute or strike by the Respondent's employees would have on the operations at the base specifically, or on the national defense generally." ALJD 5:23-25.
4. "Nothing in the record establishes that haircuts are vital to the national defense, or that the military operations at Malmstrom would be disrupted or adversely affected if service members and their dependents could not get a haircut, permanent, hair color, or any of the other services offered by the Respondent due to a strike or other labor dispute." ALJD 5:34-37.
5. "Because there is no other basis for asserting jurisdiction established by the record evidence, I recommend that the Board decline to assert jurisdiction in this case and that the complaint be dismissed." ALJD 5:39-41.

Instead of bringing a factually sufficient case, the General Counsel ignored

the Board's rule requiring an explanation for what the "link between the Employer's operations and the national defense effort is." Pentagon Barber Shop, Inc., 255 N.L.R.B. 1248, 1248 (1981). The legal precedent of that decision is obvious, but the General Counsel never explained to Judge Marchionese why he did or could not follow it.

For EAJA purposes, "if the government failed to consider a relevant factor or inadequately explained its decision, the government's position will not always be 'substantially justified.' Rose, 806 F.2d at 1089. For example, the government's position is not 'substantially justified' where it disparately treats 'two similarly situated parties.' Id." Calloway v. Brownlee, 400 F. Supp.2d 52, 55 (D.D.C. 2005), quoting FEC v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).

This case is a perfect fit for the remedy the EAJA was designed for. The General Counsel never distinguished Pentagon Barber Shop. The Regional Director may have had an existential argument to assert national defense jurisdiction, but when he chose to actually file the complaint to litigate the concept, he submitted no proof whatsoever—capricious conduct in every context of the law. How can the Agency plead and litigate a case without evidence and demand the respondent bear the cost? In federal court, this would be a clear Rule 11(b)(3) violation, which requires "The factual contentions have evidentiary support."

The legislative history of EAJA reveals the intent for a broad and scrutinizing review: "The committee's clarification of the 'position' term is intended to broaden the court's or agency's focus of inquiry for EAJA purposes beyond mere litigation arguments, and to require an assessment of those government actions that formed

the basis of the litigation." House Report, H.R. Rep. 99-120(I), H.R. Rep. 99-120, H.R. Rep. No. 120(I), 99th Cong., 1st Sess. 1985, 1985 WL 47108 at 20-21. Here, Judge Marchionese found "no evidence" to establish any jurisdictional element. Relying on the hope of acquiring possible evidence from the articulation of litigation arguments at the hearing and post-hearing, fails the legislative test.

Judge Marchionese did not explain why any particular statements in the Board's "older" cases should be followed in light of newer Board cases. ALJSD 3 l.35. His EAJA review failed to explain on what basis "[t]he latter cases were sufficiently distinguishable from the facts here." ALJD 3 ll.38. Neither did the Roy Spa I majority.

Stating the General Counsel's attempt to make out any case for the union was a reasonable act is not the EAJA standard. The statutory question is whether in asserting national defense jurisdiction over a family hair salon, was it reasonable to allege the service provided by Roy Spa was vital to national defense? No reasonable person would admit the preposterous claim. There were no conflicting inferences from the evidence. Judge Marchionese found "no evidence that would show what, if any impact, a labor dispute or strike by the Respondent's employees would have on the operations at the base specifically, or on the national defense generally." ALJD 5:23-25

A "fresh look" at the case apart from the legal merits is part of the task. FEC v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986). In both Decisions, the Board majorities adopted the ALJs' reasonings without comment and without either ALJ utilizing the statutory criteria for determining whether the circumstances fell within

the EAJA statute—on the litigation position and/or the underlying position of the General Counsel. In fact, neither ALJ quoted the statute at all. Judge Giannasi did not even quote the Board's regulatory standard in Section 102.144 of the Board's Rules & Regulations.

As shown above the Board has failed to explain whether both the underlying position, litigation position, and lack of any supporting evidence of any jurisdiction by the General Counsel was substantially justified. For these reasons, the Board should reconsider its rulings and find that this tripartite review is necessary and was not satisfied by the party bearing the burden of proof, the General Counsel. Section 102.144: "The burden of proof that an award should not be made to an eligible applicant is on the General Counsel...."

2. Affirming the Grant of an Untimely Extension of Time to the General Counsel Sixty-Nine Days after the Application for Fees Was Filed is an Abuse of Discretion.

Judge Marchionese granted the General Counsel's motion for extension of time to file a motion to dismiss the Application sixty-nine days after the Application was filed. The Board majority in Roy Spa I held the General Counsel's failure to file a timely response was fine because the late referral to the ALJ by the Executive Director was an unusual circumstance. Id. at 2. The Board determined its EAJA filing rules did not "preclude" a late filing, despite mandatory language that extensions must occur within the time allowed. Id. at 3.

Chairman Miscimarra's dissent in Roy Spa I shows there is "no valid justification" that a "lower standard" for extensions of time apply in EAJA cases. His dissent in Roy Spa II, reveals the impact of granting an extension to allow the

General Counsel additional briefing opportunities to set up factual disputes only resulted in multiple "Complications" leading Judge Gianassi to answer factual questions on a cold record when the hearing ALJ, Judge Marchionese, actually heard the witnesses and was able to evaluate their credibility and imply logical facts and could not do so.

The Board promulgated Rules and Regulations under EAJA. 29 U.S.C. §§102.143 *et seq*.

Section 102.150 of the Board's Rules and Regulations sets forth the time in which the General Counsel must answer the Application:

> (a) Within 35 days after service of an application the General Counsel may file an answer to the application. Unless the General Counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, *failure to file a timely answer may be treated as a consent to the award requested.* The *filing of a motion to dismiss the application shall stay the time for filing an answer* to a date 35 days after issuance of any order denying the motion. [Emphasis added].

102.49(b) expressly limits filing any EAJA extensions of time to "not later than 3 days before the due date of the document":

> Motions for extensions of time to file motions, documents, or pleadings permitted by section 102.150 or by section 102.152 shall be filed with the chief administrative law judge in Washington, D.C., the associate chief administrative law judge in San Francisco, California, or the associate chief administrative law judge in New York, New York, or in Atlanta, Georgia, as the case may be, not later than 3 days before the due date of the document. Notice of the request shall be immediately served on all other parties and proof of service furnished.

Nothing in the General Counsel's motion showed he filed a timely request for an extension of time to file a motion to dismiss. The request was filed on the sixty-ninth (69th) day after the Application was filed. A timely answer within 35 days

was due on October 17, 2013. Accounting for an extension of time authorized because of the government shutdown, the due date for the General Counsel's Answer to the Application extended to November 2, 2013. Even then the request is eighteen days late.

The Executive Secretary referred the matter to Judge Marchionese on November 5, 2013, as no Answer or other motion was filed within the prescribed time period. The timing of the Executive Secretary's referral was for the ALJ to decide the EAJA matter on the record as it existed, not to allow the General Counsel to file additional pleadings to prolong the consideration of the issue.

With the only reason for the out of time Request being "current work load," the motion should have been denied. Under Section 102.149(b), a motion to delay the filing of the required Answer or a motion to dismiss was due by counsel for the General Counsel no later than October 30, 2013, under the three-day rule in the Board's EAJA Rule 102.49(b).

Section 102.150(a) establishes the procedural facts applicable to this case. The Regulation expressly provides that "*[u]nless* the General Counsel requests an extension of time...failure to file a timely answer may be treated as a consent to the award requested." The two parts of this Rule establish first, that an answer must be "timely." Second, the Rule links the General Counsel's filing a motion for extension of time to a period prior to the time a "timely answer" is filed: "The *filing of a* motion to dismiss the application shall stay the time for filing an answer to a date 35 days after issuance of any order denying the motion." A motion to dismiss must clearly be filed before an Answer is due in order to "stay the time for filing an answer."

The Roy Spa I majority asserts rigorous application of the rules would "deprive a judge of authority" to manage his cases by obtaining whatever information is needed to resolve the issues. Roy Spa I at 3 n.11. There is no authority cited for this proposition, but the purpose of Rules is to manage cases in a logical and fair manner. Granting the General Counsel in this situation, extra-Rule authority not available to the EAJA moving party, puts a thumb on the scale of fairness.

Nothing in the Board's promulgated EAJA Rules allows this result and the Board majority does not cite any authority except "the order was within the judge's discretion" under the Board's Rules, without citing any applicable EAJA Rule. Id. at 3 n.12.

It is notable the reason employed by the ALJ for granting additional time was it "was not unreasonable for the General Counsel to conclude it was not too late to respond to the Respondent's application." Order Denying Motion for Reconsideration (Nov. 26, 2013). With the General Counsel's Answer originally due on October 17, 2013, and automatically extended to November 2, 2013, because of the government shutdown, there is no valid reason "to conclude" the General Counsel had *not* run out of time to file.

Rather, the filing of a motion for extension of time over three weeks later to file a motion to dismiss four weeks further out, is unreasonable and does not comply with any rule published by the Board. It is difficult to suggest that there were "unique circumstances" in this case to allow a two-month extension. Id. Rather, the General Counsel was advantaged by the period of the government shutdown that

extended his time to file and provided him with additional time to timely file for an extension, which he failed to do.

Furthermore, no extraordinary cause to justify the General Counsel's failure to meet the Board's express filing date in the EAJA regulation is offered. The Board's caselaw is consistent: "[T]he Board will not address a respondent's assertions that it has a meritorious defense unless good cause has been shown for the late response. Dong-A Daily North America, Inc., 332 NLRB 15, 16 (2000)." Pointing Plus, Inc., 358 N.L.R.B. No. 154 at 2 (2012) (denying motion for extension of time to file an answer after the "missed deadline").

Here, the General Counsel posited to the ALJ not a single reason to explain why his severely delinquent request under the strict filing limitations in the Rules for both the Applicant and counsel for the General Counsel as set forth in the EAJA and the Board's implementing regulations, might allow the relief requested. Without any basis in the Rules, the request was without merit and should have been denied under EAJA Rule 102.149(b).

As Chairman Miscimarra explains in dissent in Roy Spa II, as "Complication #2", the cascading effect of the extension of time provided the General Counsel, led Judge Giannasi into "Complication #5" where he found the General Counsel could have succeeded on the merits of the successor issue without hearing from witnesses and testing their credibility, and by misreading Board precedent that a representative complement must be ascertained by finding facts concerning the number of cosmetologists employed between the time when Roy Spa, LLC began performing its contractual services and when it provided temporary barber services.

The Board majorities acceptance of Judge Giannasi's recommendation based on his assertion of erroneous facts cannot result in reasoned decisionmaking by the Board. Relying upon erroneous facts is the basis for arbitrary and capricious agency decisionmaking. Universal Camera v. NLRB, 340 U.S. 474, 488 (1951). When the Board departs from established precedent, such as Galis Equip. Co., supra, it is without reasoned justification and is therefore unreasonable. Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 378 (1998).

The General Counsel's Request for an extension of time should have been denied by the ALJ for these reasons. The matter should be reconsidered by the Board without the General Counsel's late filed submissions.

III. CONCLUSION

For the reasons stated above and in Roy Spa's previous filings in these proceedings, which are incorporated herein by reference, the Board should grant Roy Spa's Motion for Reconsideration of its earlier Decisions, and grant its Application for fees and expenses as the prevailing party.

Respectfully submitted,

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August 24, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the APPLICANT'S MOTION FOR RECONSIDERATION was efiled to the Executive Secretary's Office and emailed to the following persons on this the 24th day of August 2017:

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